BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

RONALD J. SCHULTZ Claimant VS.	)	
	)	Docket No. 163,570
A.H.R.S. CONSTRUCTION Respondent AND	)	
TRINITY UNIVERSAL INSURANCE CO. Insurance Carrier	)	

ORDER

ON the 1st day of March, 1994, the application of the respondent for review by the Workers Compensation Appeals Board of an Award entered by Administrative Law Judge James R. Ward, dated January 11, 1994, came on for oral argument.

APPEARANCES

Claimant appeared by and through his attorney, Dennis L. Horner of Kansas City, Kansas. Respondent and its insurance carrier appeared by and through their attorney, Rex W. Henoch of Kansas City, Kansas. There were no other appearances.

RECORD

The record consists of the transcripts of the regular hearing held on June 30, 1993, and the depositions of Revis C. Lewis, M.D. taken June 14, 1993; Monty Longacre taken August 6, 1993; Linda Andrews taken August 31, 1993; and David A. Tillema, M.D. taken September 22, 1993.

STIPULATIONS

The Appeals Board adopts the stipulations listed in the January 11, 1994 Award.

ISSUES

After stipulations were taken there remained for decision by the Administrative Law Judge the following issues:

(1) The nature and extent of claimant's disability;

(2) Claimant's entitlement to future medical;

(3) Claimant's entitlement to unauthorized medical expense; and,

(4) Respondent's entitlement to a credit of $245.16 for overpayment of temporary total benefits.

In this appeal the parties challenge only the decision relating to nature and extent of claimant's disability. The Appeals Board adopts the finding of the Administrative Law Judge on all the other issues but will review de novo the evidence relating to nature and extent of claimant's disability.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After consideration of the arguments made and review of the evidence presented, the Appeals Board agrees with the finding by the Administrative Law Judge that claimant has sustained a fifty-five percent (55%) permanent partial general disability.

Respondent argues that the Administrative Law Judge has arrived at an unfairly high percentage of disability because of two errors in the analysis. First the respondent contends the Administrative Law Judge has not properly considered testimony that claimant is physically able to perform certain work for the United States Postal Department which would pay a wage higher than he was earning at the time of his injury. Second, respondent argues that the decision does not properly weigh the opinions of claimant's vocational expert; that the opinions of that expert, Monty Longacre, should be discounted because he has used an analysis based upon job titles rather than jobs.

Claimant suffered accidental injury arising out of and in the course of his employment in a truck accident which occurred in May 1991. Medical testimony and records indicate that claimant suffered a compression fracture to three thoracic and one lumbar vertebra. Revis C. Lewis, M.D., a neurosurgeon, testified that the injury resulted in a twenty-five (25%) impairment of function to the body as a whole. David A. Tillema, M.D., an orthopedic surgeon, concluded from his examination that claimant has a seventeen percent (17%) permanent partial impairment to the body as a whole.

Both physicians recommended work restrictions. Dr. Lewis indicated claimant should avoid repetitive bending and stooping, should avoid lifting more than ten to twenty pounds on a regular basis and should not lift more than fifty pounds on an occasional basis. Dr. Tillema recommended the claimant not do extremes of heavy lifting, bending or frequent lifting. He testified that he felt claimant could do work in the medium category of work as defined in the *Dictionary of Occupational Titles*.

Based upon the restrictions recommended by Dr. Lewis and Dr. Tillema as well as a similar set of restrictions recommended by Dr. Canedy, claimant's vocational expert, Monty Longacre, concluded that claimant has lost access to sixty percent (60%) of his pre-injury labor market and suffered a thirty-five percent (35%) loss of ability to earn a

comparable wage. The calculation of lost ability to earn a comparable wage was based upon his projection that claimant would be able to earn $220.00 per week post injury compared to the $366.86 per week he was earning at the time of the injury. Claimant did work at two jobs after his accident and Mr. Longacre indicated comparison of actual post-injury wages to the pre-injury wage showed a fifty-nine percent (59%) reduction in ability to earn a comparable wage. Mr. Longacre testified that his opinions were based in part on his knowledge of the area where claimant currently resides. He has done job searches in that area.

Respondent contends that the finding of fifty-five percent (55%) permanent partial disability fails to properly take into consideration evidence that claimant was physically able to do certain work for the United States Postal Service which would pay a wage equal to or greater than that he was earning at the time of his injury. The evidence does show that claimant had, prior to this injury, worked part time for the United States Postal Services at an hourly wage higher than he received at his job for respondent. He did some of this same work, again part-time, after his accident. Again the hourly wage was higher than the hourly wage he earned working for respondent. Respondent argues that this evidence establishes claimant has the "ability" to earn a comparable wage and that the loss of ability to earn a comparable wage should be treated as zero percent (0%).

Claimant argues, on the other hand, that the evidence does not in any way suggest claimant is likely to actually obtain full time employment with the postal service. He has worked there for seven or eight years. He has been on the list for a full-time job but none has been offered during the extended period of time he has worked as a substitute mail carrier. Claimant contends that the opportunity for work at a comparable wage must be a realistic opportunity, not merely a theoretic possibility. K.S.A. 44-510e, (1992 Supp.), the statute at issue, provides in pertinent part:

> "The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the ability of the employee to perform work in the open labor market and to earn comparable wages has been reduced, taking into consideration the employee's education, training, experience and capacity for rehabilitation . . . ." (Emphasis added).

In Hughes v. Inland Container, 247 Kan. 407, 799 P.2d 1011 (1990) the Kansas Supreme Court interpreted the above language as requiring a two prong analysis. The loss of ability to earn comparable wage is one of the two prongs to be weighed. The argument of the parties here focuses on and requires definition of the term "ability." At one extreme the claimant might be considered to have the "ability" to earn a comparable wage if he retains the physical ability to perform jobs which pay a comparable wage regardless of whether there is any realistic possibility he will obtain such a job. At the other extreme, the claimant might be considered to have the "ability" to earn a comparable wage only if it is shown not only that he is physically able to perform the duties but also that he will in fact be employed at the comparable wage.

The Appeals Board understands the test as one which falls between these two extremes. The comparable wage employment must be more than a theoretical possibility. The Appeals Board believes the Legislature intended the analysis to be based on realistic possibilities. On the other hand, it would be impractical to expect a showing of what jobs claimant will actually obtain.

The Appeals Board considers the determination of reduction in ability to earn a comparable wage to call for a projection of what probably or most likely will be the impact on claimant's future earnings based on the realistic possibilities. This interpretation is encouraged by the presumption found in K.S.A. 44-510e (1992 Supp.) which applies in cases where the claimant does actually return to work at a comparable wage. Claimant may there be limited to a functional impairment even with work restrictions. The Appeals Board understands the presumption as an indication that the Legislature intended the determination of work disability to be one based upon the projected practical and realistic impact on the employees ability to obtain employment and earn wages.

The evidence in this case suggests it is possible, but not probable, claimant will obtain a position with the postal department. He has worked as a substitute carrier since 1986. He has taken the test to qualify for regular employment but has not, in approximately seven years, ever been offered regular employment. Under the circumstances, the Appeals Board does not consider it probable that he will be earning the wage paid at the U.S. Postal Department.

From the evidence presented, the Appeals Board finds that as a result of his injury, claimant's ability to earn a comparable wage has been reduced by fifty percent (50%). This finding takes into consideration the severity of the injury, the expert's projected reduction of thirty-five percent (35%), and the actual loss since the injury of fifty-nine percent (59%). Greater weight is given to the actual loss and consideration is also given to testimony of the limited nature of the job market in the area where claimant resides.

Respondent also challenges the methodology employed by Monty Longacre in arriving at his conclusion as to loss of access to the labor market. Specifically the respondent points out that Mr. Longacre employs a method which looks at the job titles from the *Dictionary of Occupational Titles* listings. He contends that this method is inaccurate because various job titles have differing numbers of jobs within that specific title. He points out that the restriction which excludes some jobs within the job title will act to exclude all jobs under the method used by Mr. Longacre.

Respondent's arguments make several reasonable points which may challenge the accuracy of projections by Mr. Longacre. However, his testimony is the only testimony in the record relating loss of access or loss of ability to earn comparable wage. As imprecise as the projections may be, the Appeals Board does not consider them so inherently unreasonable as to be discarded. See, Anderson v. Kinsley Sand & Gravel, Inc., 221 Kan. 191, 558 P.2d 146 (1976). The Appeals Board therefore finds, consistent with the opinions of Mr. Longacre, claimant has a sixty percent (60%) loss of access to the open labor market.

Because there appears no valid reason to give greater weight to loss of access to the labor market as opposed to the reduced ability to earn a comparable wage, both factors are given equal weight and the Appeals Board therefore finds claimant has a fifty-five percent (55%) permanent partial general disability.

AWARD

WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE in favor of claimant, Ronald J. Schultz, and against the respondent, AHRS Construction Company, and its insurance carrier, Trinity Universal Insurance Company, for 28 weeks of temporary total disability compensation, at the rate of $244.59 per week, in the sum of $6,848.52 and

temporary partial disability compensation for three weeks, in the amount of $176.18, followed by 384 weeks of compensation, at the rate of $134.52 per week, in the sum of $51,655.68, for a 55% permanent partial disability to the body as a whole, making a total award of $58,680.38.

As of January 7, 1994, there would be due and owing to claimant the sum of $21,360.50, payable in one lump sum less the compensation heretofore paid. Thereafter, the balance of compensation in the amount of $37,319.88 is payable at the rate of $134.52 per week, for 277.43 weeks, unless otherwise ordered.

Respondent and insurance carrier are ordered to pay unauthorized medical expenses up to $350.00 for the examination by Revis C. Lewis, M.D.

Claimant's attorney is granted a lien against the proceeds of this award for not more than 25%, pursuant to K.S.A. 44-536 (1992 Supp.).

Reporters' fees are assessed as costs against the respondent and insurance carrier to be paid direct as follows:

Appino & Achten Reporting Service	$191.70
Debra L. Richecky, C.S.R.	(Amount Unknown)
Hostetler & Associates Inc.	133.80
Metropolitan Court Reporters Inc.	617.20

IT IS SO ORDERED.

Dated this ____ day of May, 1994.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Dennis L. Horner, 302 Security Bank Bldg., 707 Minnesota Av., Kansas City, KS 66101
Rex W. Henoch, PO Box 1300, Kansas City, Kansas 66117
James R. Ward, Administrative Law Judge
George Gomez, Director